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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 14-15) is not yet reported. The memorandum opinion of the District Court (R. 7-9) is reported *sub nom. Tom We Shung* v. *McGrath* at 103 F. Supp. 507.

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JURISDICTION

The judgment of the Court of Appeals was entered July 2, 1953 (R. 16). The petition for a writ of certiorari was filed August 7, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Upon his arrival from China in November, 1947, twenty-year-old Tom We Shung, a Chinese alien (R. 10), sought admission into the United States at San Francisco, California under the provisions of 8 U.S.C. 232, as the blood son of one Tom Wing, an honorably discharged veteran of World War II who filed the present petition upon Shung's behalf (R. 1, 2). Following a hearing in January, 1948, and February, 1949, an immigration board of special inquiry at San Francisco, California, determined that Shung was inadmissible on the ground that he had not established that he was the blood son of Wing (R. 2). On appeal to the Board of Immigration Appeals, the exclusion decision was affirmed (R. 3).

Subsequently, in the United States District Court for the District of Columbia, petitioner filed an action, amended June 10, 1950, for review of the order under the Administrative Procedure Act (5 U.S.C. 1001 *et seq.*) and for a declaratory judgment that the hearing accorded him in San Francisco was unfair, null and void and that he was in fact Wing's blood son and admissible into the United States under 8 U.S.C. 232. He based his action on two principal grounds: (1) that the board of

special inquiry was improperly constituted in that it was composed of two immigration officials and a clerk-stenographer rather than three immigration officials, as allegedly required by law, and that it was not composed of hearing examiners appointed in conformity with the Administrative Procedure Act, and (2) that the board's finding that he was not Wing's blood son was not supported by any evidence whatsoever.

The Government's answer alleged that the board of special inquiry was properly constituted and that such boards were not required to be appointed in conformity with the Administrative Procedure Act. It denied that there was substantial evidence introduced at the hearing that petitioner was Wing's blood son (R. 4-5).

The District Court dismissed petitioner's action (R. 10-11), issuing findings of fact and conclusions of law (R. 9-10). It held that, since the Declaratory Judgment Act (28 U.S.C. 2201) allowed judicial review of the administrative determination here involved, it was unnecessary to consider the applicability of the Administrative Procedure Act. The court held that such review was limited merely to a determination of whether the board was properly constituted and whether it abused its discretion in making the determination in question since, by statute, the decision of a board of special inquiry was final. Thereupon the court found that the board was properly constituted; that in any event, petitioner waived any objection to the board's composition when he failed to object at the time of the

hearing; that petitioner had received a fair hearing; and that the evidence adduced at the hearing amply supported the board's determination. It ordered that the amended complaint should be dismissed (R. 7-10). On appeal, the Court of Appeals affirmed (R. 16). Agreeing with the lower court's findings, it further said (R. 15):

> The recent decision of the Supreme Court in *Heikkila* v. *Barber,* 345 U.S. 229 (March 16, 1953), may suggest a serious question as to the right of judicial review of an exclusion order except by the limited process of habeas corpus. However, as appellant has been accorded the benefit of a full review and questions concerning validity of the administrative proceedings have been considered and resolved against him, it is unnecessary for us to consider the question now.

ARGUMENT

Petitioner does not challenge the validity of the exclusion determination by the immigration board of special inquiry nor does he challenge the judgment of the court below affirming the dismissal of the complaint. His sole contention (Pet. 2, 5) is that in the light of this Court's decision in *Heikkila* v. *Barber,* 345 U.S. 229 (decided after the judgment of the District Court), the court below did not have jurisdiction in a declaratory judgment action to review the exclusion determination of an immigration board of special inquiry, and that it should have dismissed the action solely on the basis of lack of jurisdiction rather than on the merits. It is true

that under the *Heikkila* decision the appropriate way for petitioner to have challenged the order of exclusion would appear to be by writ of habeas corpus. It is also true that it was petitioner who sought relief by the declaratory judgment route, and that he actually obtained a review of the outstanding exclusion order which was at least as extensive, if not more so, than that which he would be able to obtain by habeas corpus. See *Heikkila* v. *Barber, supra,* at 235-236. In these circumstances, we see no need to disturb the decision of the court below.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the petition for a writ of certiorari be denied.

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SEPTEMBER 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 [illegible]

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